Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

VERNON G. JOHNSON,
Petitioner

VS.

BAYLOR UNIVERSITY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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43 pp

QUESTION PRESENTED

1. Should a Plaintiff asserting a wrongful termination claim based on an admission by an employer that the Plaintiff's termination was precipitated by his physical condition, i.e. obesity, be required to prove that the employer also "perceived" his physical disability, i.e.obesity, to disable him from obtaining employment in a class or range of jobs with other employers within the geographical area in order to sustain a claim for relief based on "perceived disability" under the ADA and/or the Rehabilitation Act?

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES 2

LIST OF ALL INTERESTED PARTIES 4

CITATIONS FOR REPORTS OF LOWER COURT 5
DECISIONS IN THIS CASE

STATEMENT OF JURISDICTION 5
COURSE OF PROCEEDINGS BELOW
BASIS OF SUPREME COURT JURISDICTION

STATEMENT OF MATERIAL CASE FACTS 8

ARGUMENT 10

APPENDIX 26

INDEX OF AUTHORITIES

CASES: **Page**

Chandler v. City of Dallas, 2 F.2d 1385 (5th Cir. 1993), ... 7
cert.denied, ____U.S.____, 114 S.Ct. 1386 (1994)

Cook v. State of Rhode Island Department of Mental Health, Retardation, and Hospital, ... 7, 16, 20, 12, 22, 23
10 F.3d 17 (lst Cir. 1993)

Moore v. Eli Lilly Co., ... 9
990 F.2d 812, 815 (5th Cir. 1992),
cert.denied. 114 S.Ct. 467, 126 L.Ed.2d 419 (1993)

School Board of Nassau County, Florida v. Arline, . 7, 13, 14, 15
480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987)

STATUTES:

United States Code

ADA, 42 U.S.C. § 12110, et seq. 6, 7, 10, 11, 12, 15, 24

42 U.S.C. 1254(1) 5

Rehabilitation Act, 29 U.S.C. § 700, et seq. 7, 10, 11, 13 14, 15, 22

28 U.S.C. § 1254(1) 5

Regulations

29 C.F.R. § 1630 ..... 8, 12, 13, 14
29 C.F.R. § 1630.2(1) 9

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CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Western Division of Texas, Waco Division: not reported. (Appendix, pages 1-5)

United States Court of Appeals for the Fifth Circuit: Vernon G. Johnson v. Baylor University: not reported (Appendix, pages 6-16)

STATEMENT OF JURISDICTION

Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered its judgment on the 18th of September, 1997. (Appendix, p.32)

Supreme Court Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from a Summary Judgment entered by the United States District Court for the Western District of Texas, Waco Division.

This Petition is filed for two purposes: (1) to resolve a question of importance that significantly affected the outcome of this case and that is of grave public interest in the area of employment and civil rights; and (2) to secure uniformity of decisions between Circuit Courts of Appeals and this Supreme Court.

This Petition poses the question: When an employer admittedly discharges an obese employee because of the "appearance" of the employee, which is "inextricably linked to the employee's obesity" and because the employee has not complied with the employer's directives to lose weight, does the employee have to prove that the employer thought that other employers would not hire him because of his obesity in order to assert a claim for relief under provisions of the ADA and the Rehabilitation Act that both prohibit discrimination on the basis of a "perceived disability."

If the answer to this question is "Yes", then an employee asserting a claim for wrongful discharge based on a "perceived disability" has an impossible burden of proof despite the fact that an employer has admitted that the termination decision was made because of the physical condition (a/k/a/ "appearance") of the employee.

The Fifth Circuit has expressly held that a plaintiff in a perceived disability case has to prove that the "employer thought" that "other employers would not hire him because of his obesity." (Fifth Ciruit Opinion, Appendix, p. 14.) It is rare at best for an employer to admit that he has discharged an employee because he was too fat; and it would be virtually impossible to get an employer to admit that he thought that all or even most or even many employers would not employ such a person. In essence, the Fifth Circuit Court's opinion in this case allows an employer to defend his action by merely swearing that he thought the person could get a job of some other type or with some other employers and the case would be over. Or, even worse, the employer could state, as in this case, that he believed the employee "could" or "might" work for someone "who had different standards for appearance" than Baylor University; and absent proof to the contrary the Plaintiff would be prevented from seeking relief under the ADA or Rehabilitation Act provisions relating to "perceived disability".

Vernon Johnson appeals a summary judgment in favor of Baylor University on employment discrimination claims under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. Finding no error, we affirm.

I.

Baylor's former president, Herbert Reynolds, hired Johnson to be the university's chief pilot beginning the first day of 1992. In that position, Johnson was responsible for shuttling Reynolds and other university VIP's on the university's airplane. When hired, Johnson weighed approximately 275 pounds. His weight was a source of irritation to Reynolds, who insisted that Johnson lose weight. In fact, Reynolds made the continuation of Johnson's employment conditional on losing over one hundred pounds during the first ninety days of employment.

Not surprisingly, Johnson was unable to lose so much weight in so little time. Reynolds, however, did not terminate Johnson at the end of the first ninety days. Instead, Reynolds repeatedly made Johnson and the relevant university officials aware of Johnson's expertise as a pilot, while at the same time pressing him to lose weight, to improve his appearance at work (such as tucking in his shirt tail and remembering to wear a suit jacket on the airplane), and to correct his grammatically flawed parlance.

Reynolds noted that Johnson's position put him in contact with many important university benefactors and therefore required a certain comeliness on Johnson's part that might not otherwise be required. Moreover, Reynolds expressed concern that Johnson's weight made him a health risk, so he continued to prod Johnson to lose weight in order to help to reduce the university's health insurance costs.

Consequently, Reynolds warned Johnson that failure to correct these problems put Johnson's position at Baylor in

jeopardy. In August 1994, Reynolds fired Johnson, noting a substantial failure to ameliorate the problems noted above.

II.

Johnson sued Baylor,[1] an institution receiving federal funds, claiming that his termination violated the ADA, 42 U.S.C. § 12112(a) (prohibiting institutions receiving federal funds from discriminating against the disabled).[2] Johnson based his statutorily required showing of a disability on a theory that Baylor, through Reynolds, regarded him as being unemployable because of his weight and that this perception led to his termination. Johnson alleged only a "regarded as" claim and has never asserted that his weight was in fact a disability.

Baylor contended that Johnson had failed to present sufficient evidence that Reynolds regarded him as being substantially impaired from participating in major life activity, as

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[1] Subject matter jurisdiction based on 28 U.S.C. §§ 1331, 1343.

[2] The relevant portion of the Rehabilitation Act provides: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). Furthermore, and relevant for purposes of this case: "The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . ." *Id.* § 794(d). Accordingly, the ensuing discussion in the text of the ADA's disability requirement should be treated as encompassing the disability requirement under the Rehabilitation Act as well.

originally directed, on two occasions following the initial employment letter, to-wit: in April, 1992 (R. 261-272, 212), and June, 1993 (R. 273-274, 256-260, 210, 209).[3]

Dr. Reynolds cited Johnson's "weight, his appearance, and his grammar" as the concerns precipitating Johnson's termination (R.208), and Dr. Reynolds testified that Johnson's weight was "inextricably linked" to Johnson's "appearance" (R. 167-168) and that Johnson essentially could not improve his appearance unless he lost weight (R. 184-189, 162-168, 147-150).

Johnson testified that Dr. Reynolds told him that he needed to lose weight because overweight people were sick more and his weight was a threat to Baylor's insurance policy and/or insurance rates (R. 265, 230-231, 240, 220-221); but Dr. Reynolds denied making such statements. However, Reynolds did admit that Johnson's weight was a factor precipitating his discharge because it was "inextricably linked" to his appearance, which "diminished the image of the University" because Johnson was required to come in contact with "VIP's" and significant "donors" of the University (R. 94, 184-189).

Standard of Review

A court's grant of a summary judgment is to be reviewed de novo. "Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was proper, all fact questions are viewed in the light most favorable to the non-movant." Moore v. Eli Lilly Co., 990 F.2d

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[3] Dr. Reynolds added complaints about Johnson's "dress and grooming" and "grammar" in April of 1992 (R. 212), which complaints were reiterated in June of 1993 (R. 210, 209) along with an additional complaint about Johnson's "diction" (R. 325, 210).

812, 815 (5th Cir. 1992), cert. denied, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993).

Argument and Authorities

In its Order signed on February 12, 1997, the district court stated that summary judgment was proper in this case because the Plaintiff "has failed to establish a necessary element of his claim: that Baylor perceived him as being unable to perform either a class of jobs or a broad range of jobs in various classes" (Appendix, p.2). In support of the district court's ruling, the court stated further that Plaintiff's summary judgment proof was fatally deficient because he did not present evidence that "Baylor or Reynolds considered that Plaintiff would be unable to perform a pilot's job **at another institution or organization**" (Appendix, p.4-5, emphasis added). As additional support for the court's ruling, the court stated that Plaintiff failed to present evidence "that Baylor or Reynolds considered that Plaintiff's weight kept him from performing **other types of jobs**" (Appendix, p.4, emphasis added).

By Order entered September 18, 1997, the Fifth Circuit agreed with the district court, stating that it was Plaintiff's burden to prove that

> "The *employer thought* that other employers would not hire him because of his obesity. *See* 42 U.S.C. § 12012(2) (C)."

(*Id.*, Appendix, p. 13.)

In support of their respective opinions, both the district court and the fifth circuit relied heavily on EEOC guidelines implementing the ADA, 29 C.F.R. § 1630. However, the guidelines applied by both court's were selective and incomplete and resulted in an erroneous decision.

Both courts correctly stated that Johnson's causes of action were asserted under the provisions of the ADA and the Rehabilitation Act that related to "being regarded as having" an impairment, i.e. his "impairment" existed solely because of perception rather than because of any impairment in fact.

Although neither the ADA nor the Rehabilitation Act specifically define the term "regarded as having such an impairment", the EEOC's comprehensive regulations implementing the ADA, 29 C.F.R. § 1630, do provide guidance for the interpretation of the Act. For example, Sec. 1630.2, entitled "Definitions", specifically provides a definition of "regarded as having such an impairment" as follows[4]:

> (l) *Is regarded as having such an impairment* means:
>
> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment. (29 C.F.R. § 1630.2(l))

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[4] The "definition" cited is the critical guideline that was wholly ignored by both the district and the Fifth Circuit in reviewing Plaintiff's case and in deciding the scope of Plaintiff's burden of proof in this case.

In other words, the definition of "regarded as having such an impairment" does not in any instance require that the affected individual actually have an "impairment that substantially limits major life activities" but only requires that the affected individual be treated as having such an impairment or, alternatively, that the individual has a substantial impairment "only as a result of the attitudes of others toward the impairment".

If the district court and the Fifth circuit had incorporated this provision of the EEOC comprehensive guidelines into their respective analyses, it would have been apparent that Plaintiff's complaint is related to the second alternative definition of "regarded as having an impairment." Plaintiff was expressly discharged because of his obesity, and the employer admitted that Plaintiff's weight was inextricably linked to his "appearance." Furthermore, the employer expressly stated that Plaintiff was dicharged because his appearance conveyed a negative "image" to persons with whom he came in contact, especially "VIPs" and "donors". Obviously, Plaintiff's employer considered his physical condition to be an impairment because of the attitudes of its constituency toward Plaintiff's physique.

In the Appendix to Part 1630, cited supra, which is entitled "Interpretive Guidance on Title I of the Americans with Disabilities Act", EEOC provides valuable, or "essential" interpretive guidance "to ensure that qualified individuals...understand their rights under this part and to facilitate and encourage compliance by covered entities. The interpretive guidance provided by EEOC with respect to being "regarded as having such an impairment" reads, in relevant part, as follows:

> An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives

the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigned the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

An individual satisfies the second part of the 'regarded as' definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but **does not limit the individual's major life activities.** See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the 'regarded as' definition of 'disability' if the employer or other covered entity erroneously believed the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the 'regarded as' part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in

School Board of Nassau County v. Arline, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. 'Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.' 480 U.S. at 283. The Court concluded that by including 'regarded as' in the Rehabilitation Act's definition, 'Congress acknowledged that society's accumulated myths and fears about disabilities and diseases are as handicapping as are the physical limitations that flow from actual impairment.' 480 U.S. 284.

> An individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, costs of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.
>
> Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on 'myth, fear or stereotype', the individual will satisfy the 'regarded as' part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the

> **employer is acting on the basis of 'myth, fear or stereotype' can be drawn. (Emphasis added)**

The district court and the Fifth Circuit both required Plaintiff to educe proof that his impairment substantially interfered with a major life activity, specifically the major life activity of working. As noted supra in the EEOC's interpretive guidelines, an individual who comes within the second prong of the definition of "being regarded as having such an impairment" really has no substantial impairment that limits his or her "major life activities", except as a result of the attitude of others. The summary judgment evidence clearly showed that Plaintiff's discharge was not related to any question about his skill as a pilot, but was instead occasioned by a concern about the attitudes of others toward his physically obese condition, and the negative reflection his physical condition had on the "image" of the university.

As stated above, the EEOC guidelines and interpretations are expressly based on this Court's opinion in *School Board of Nassau County, Florida v. Arline*. Under those guidelines and interpretations and under the language of this Court's opinion in *Arline*, a jury can infer that an employer is acting on the basis of myth, fear, or stereotype, if the Plaintiff can prove that an employment decision was made on the basis of a perception of disability, i.e., inability to continue to work in the position for which he was otherwise qualified, on the basis of myth, fear, or stereotype, and if the employer articulated no other legitimate non-discriminatory reason. The summary judgment evidence was sufficient to support such an inference in this case and the burden imposed on Plaintiff by the district court and Fifth circuit in this case is misplaced and unreasonable.

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In the instant case, Dr. Herbert Reynolds, then-President of Baylor, was Plaintiff's supervisor and the decision-maker in Johnson's discharge. Dr. Reynolds basically admitted

that Johnson's employment was terminated because he was "obese" and did not significantly reduce his body weight during his employment at Baylor. Reynolds admitted all of the following facts and all of the following admitted facts were included in the summary judgment evidence presented to the district court and the Fifth Circuit:

1. Johnson was hired and placed on probation subject to an express requirement that he reduce his body weight to 172 pounds within the 90-day probationary employment period at Baylor (R. 213, 182-185); and

2. Reynolds believed Johnson to be "obese"[5] at the time he was hired (R. 182); and Reynolds did not see any significant reduction in Johnson's weight during his employment (R. 159-160); and

3. Johnson was employed in one of several positions that required exemplary "appearance" because persons employed in the positions came into contact with VIPs and significant donors of the University and exemplary "appearance" was essential for preserving the "image" that Baylor University presented to such VIPs and donors (R. 184-189); and

4. Johnson's appearance was "inextricably linked" (R. 167-168) to his weight (R. 184-189, 162-168, 147-149); and

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[5] "Obesity" is clearly a physical condition and is covered as a perceived "disability" even though it may be "voluntary" and even though it is not an "immutable" condition. Cook v. State of Rhode Island Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17 (1st Cir. 1993).

5. Johnson's employment at Baylor was terminated because he failed to improve his "appearance", i.e. weight, as he had been directed to do; and his appearance diminished the image of Baylor University (R. 207. 95).

Based on the deposition testimony of Dr. Reynolds, taken as a whole, Johnson's obesity was viewed more or less as an "appearance" issue, somewhat like a cosmetic disfigurement, referred to in 29 C.F.R. § 1630.2 and cited as an example of a perceived disability in the Appendix to 29 C.F.R. § 1630, cited supra. Dr. Reynolds clearly believed that Johnson's appearance would be offensive to important persons and significant donors (R. 184-189) that Johnson came into contact with as a part of his job as Chief Pilot, even though no one actually ever voiced any complaint about Johnson's appearance (R. 171). As noted supra:

> If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24, House Labor Report at 53; House Judiciary Report at 30-31. (Appendix to 29 C.F.R. 1630)

Although Reynolds denied that he perceived any linkage between Johnson's weight and Johnson's health", Johnson testified that Reynolds had told him that fat people were sick more and could affect the university's medical insurance rates (R. 325, 265, 230-231, 240, 223, 220-221). Although Reynolds initially denied ever having imposed special conditions on any other overweight employee at the university (R. 194-195), when Reynolds was confronted with a copy of his own written correspondence, he acknowledged at least one instance wherein he had questioned possible "hypertension" in an overweight applicant for a faculty position and had required the applicant to undergo special physical examinations the results of which

were to be reported to him as a condition of employment even though the applicant had submitted a pre-employment physical from his physician who stated that the applicant was in "excellent health, although he should lose some weight" (R. 196-200, 153-154, 135). In the course of explaining the situation involving the overweight faculty applicant, Reynolds expressly stated that "we do not want to jeopardize our hospitalization/major medical program through unnecessary coronary accidents or strokes" (R. 135). Reynolds also testified that there might be other times that potential employees were screened based on "pre-existing conditions" and the relationship between these pre-existing conditions and the university's insurance (R. 198-200). Reynolds' correspondence, cited supra, and his related testimony supports Johnson's contention that Reynolds referenced similar concerns in a conversation with Johnson in June of 1993, which conversation was confirmed by Reynolds in a letter dated June 21, 1993, stating that "This is the third time that I have mentioned to you that you are overweight and that this is not in your best interest or that of the University" (R. 210).

Plaintiff's evidence linking Reynolds' concern about Johnson's overweight condition to the possibility of jeopardizing the university's health insurance is another one of the concerns that was cited as a barrier to employment of disabled, i.e. a concern about *"insurance"* issues, as noted in the Appendix to 29 C.F.R. § 1630, cited supra.

Despite the fact that Baylor, through Reynolds, admitted that Plaintiff was a skilled pilot, and despite the fact that Johnson's employment was terminated because of his "appearance" (which was a Reynolds' euphemism for "obesity" since Reynolds' testified that Johnson's "appearance" was "inextricably linked" to his weight), Baylor argued that Johnson could not prove that he was discharged because of a "perceived disability" because he failed to prove that Baylor expected him to be treated as shabbily by other employers in the area and/or

because Johnson failed to prove that he was not employable in some other job other than a job where "appearance" was so important.

Indeed, Plaintiff did submit, and specifically referenced for the courts below, summary judgment evidence that Johnson was considered to be disqualified from employment in a whole class of positions at Baylor. Reynolds' deposition testimony clearly showed that Reynolds perceived Johnson to be disqualified from an entire class of jobs, i.e. from performing any job wherein he would be required to interact with VIPs and significant donors or wherein an "individual's appearance would in some way detract from the image of the university in a significant kind of way", or wherein "the appearance of professionalism is extremely important and you want the institution to be seen in such a way that people feel that Baylor is first-rate in every way"[6], i.e. a class of jobs that extends beyond the specific position of Chief Pilot (R. 186-190)[7] Even the Defendant's own summary judgment proof, i.e. the affidavit of Reynolds (R.94-95), failed to mention any other job or jobs at Baylor that would have been suitable employment for Johnson.[8]

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[6] In Ex. B, that was attached to Reynolds' Affidavit (R. 97), Reynolds noted that his concern that Johnson's appearance was not sufficient to meet Baylor's standards for "executives" of the university, clearly referring to a "class" of jobs as opposed to a single position.

[7] Again, this testimony was specifically referenced for the courts below in Plaintiff's Response to Defendant Baylor University's Motion for Summary Judgment.

[8] Because Defendant's summary judgment proof failed to raise the issue of possible alternative employment at Baylor, it is questionable whether Plaintiff had a burden to disprove the existence of such alternative employment.

Defendant's summary judgment evidence addressed only the possibility that Johnson might be suitable for employment with employers other than Baylor. Specifically, Reynolds stated that "Mr. Johnson could work as a pilot for an overnight delivery service or for an air freight service"[9] and that "Mr. Johnson might also be able to work for other companies which have different standards for their employees' appearance...". (R. 95, emphasis added). In other words, Reynolds testimony evidences the fact that Reynolds believed that Johnson was only suitable for employment in a position where he was not as visible to customers or to the public as he was in his position at Baylor or with an employer who didn't care as much about the physical appearance of his employees. This testimony placed in the record by Defendant is nonetheless summary judgment evidence that supports Plaintiff's contention that Baylor, through Reynolds, perceived Johnson's overweight condition to be an impediment to his employability in visible positions. In other words, Reynolds testimony evidences his opinion that other employers are also likely to perceive Johnson's physical condition, i.e. his "appearance" as a disqualification for employment. If, as the courts stated, Johnson was required to prove that his physical condition probably limited his employment opportunities with other employers or, alternatively, that Baylor perceived his physical condition as a limitation on his employment opportunities in other positions and with other employers, then Plaintiff met his burden to at least raise a fact issue in this regard through the opinion testimony of Reynolds even though it was supposed to have been supportive of Defendant's position in this case.

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[9] The positions described are positions where Plaintiff would not come into contact with anyone of any particular importance and such positions would minimize the negative impact of what Reynolds euphemistically referred to as Plaintiff's "appearance".

In *Cook v. State of R.I. Dept. of MHMR*, cited supra, the court affirmed a judgment in favor of a Plaintiff who asserted aclaim for handicap discrimination based on the her obese condition. The facts of the Cook case that are very closely related to the case at bar are as follows:

1. The plaintiff in Cook claimed that she was qualified and able to do the work, but that the employer perceived her "obesity" as a disqualifying condition (and Johnson's claim is essentially the same as Cook's in this regard); and

2. The Cook court held that the condition of "obesity" is covered as a perceived "disability" even though it may be "voluntary" and even though it is not an "immutable" condition; and

3. In Cook, "morbid obesity" was defined medically as weighing more than twice one's optimal weight or more than one hundred pounds over one's optimal weight (and Johnson was deemed by his employer to be one hundred three pounds over his optimal weight, thus meeting the medical definition of "morbid obesity"; and, furthermore, Johnson's employer never disputed that Johnson met the medical definition of "morbid obesity"); and

4. The medical testimony in the Cook case was that it is medically unsafe for an individual to lose more than 20% of his/her body weight annually (and Mr. Johnson was unreasonably instructed by his employer to lose one hundred and three pound in ninety days after he became employed, which would have been medically unsafe for him; and Johnson submitted documents presented to him by his physician when he consulted with his physician about a weight loss program as part of his summary judgment proof); and

5. The plaintiff in Cook was not re-hired by the defendant because of her obese condition, even though she had been employed by the same employer twice previously in the identical position for which she had applied and not been hired, and each time she had departed voluntarily, leaving behind a spotless record (and Johnson performed his job as a pilot apparently without complaint except from Reynolds who complimented his skill as a pilot, but scorned his obese physique and Johnson learned only after he terminated his prior employment that Reynolds decided to hire him on the condition that he comply with Reynold's demand to lose one hundred and three pounds); and

6. The Plaintiff in Cook was not precluded from proving that the employer perceived her "morbid obesity" to be a substantially limitation of a major life activity--i.e. being able to work--merely because she applied for and was rejected from only one job (and the fact that Johnson was hired and discharged from only one position at Baylor should not preclude him from pursuing his claim for wrongful discharge); and

7. The Plaintiff in Cook was not required to show that the employer did not believe that she could not get a similar job with another employer before or after she was denied employment by the R.I. MHMR in order to support her claim that the R.I. MHMR discriminated against her (and Johnson should not be required to prove that Baylor believed that other employers would have discriminated against him in order to establish his claim that Baylor discriminated).

The First Circuit noted in the Cook case:

> "Under the "regarded as" prong of section 504, a plaintiff can make out a cognizable perceived disabilitiy claim by demonstrating that she was treated as if she had an impairment that substantially limits a major life activity. ... The Rehabilitation Act simply does not condition such claims on either the quantum of a plaintiff's application efforts or on her prospects of finding other employment. ... Put in slightly more concrete terms, denying an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if her conditions substantially limited a major life activity, viz, working. *Id.* At 25-26.

SUMMARY

While Plaintiff's summary judgment evidence might not be sufficient to entitle Johnson to a summary judgment on the merits, Plaintiff's summary judgment evidence was clearly sufficient to raise a fact issue as to whether or not his employment was terminated because he was regarded as being disabled for all the reasons set forth herein.

The Defendant has never contended that Plaintiff was only disqualified from being the pilot at Baylor; instead the evidence shows that he was considered to be disqualified from serving in any capacity wherein he would impact the "image" of Baylor. Defendant's own letter to Plaintiff, dated June, 1993, indicates that he did not meet the Defendant's standards for "executive" positions, which is clearly a "class" of jobs and not a "single, particular job". Thus, the courts erred in holding that Plaintiff failed to present any summary judgment evidence that

Plaintiff's weight "restricted him in his ability to perform...a class of jobs"[10] (Order, R. 433).

The courts also erred in holding that Baylor's action in discharging Johnson because of his weight can be excused because Johnson failed to educe evidence that Plaintiff's weight would be perceived by Baylor as a disabling condition that would preclude employment as a pilot at another institution or organization. It is clear that Baylor, as an institution or organization, perceived Johnson's obese condition to be detrimental to its "image" and standing (i.e. "first-rate") in the community, apparently because of the attitudes of others toward Johnson's obese condition. It is also clear that Reynolds did not think Johnson could be employed by other institutions or organizations if they had the same "standards" as Baylor. Unless Baylor can be shown to have perceived that other institutions and/or organizations have discriminatory attitudes similar to the ones that Baylor constituents are believed to have, then Baylor can't have discriminated against Johnson under this court's ruling. Thus, the application of the Court's ruling to cases involving claims of "perceived disabilities" would wholly defeat the purpose of the ADA's protection against discriminatory "attitudes", i.e. "myths, fears, or stereotypes" associated with physical conditions, and would allow an employer to escape liability for its own discriminatory actions and/or attitudes simply because another law-abiding employer, whose "standards" (R. 95) did not countenance such discriminatory attitudes, "might" (R. 95) employ the affected individual, despite the fact that the employee's physical

---

[10] According to the definition of "substantially limits" (Appendix, p. 4), a Plaintiff need only show that he or she was significantly restricted in the ability to perform "either a class of jobs or a broad range of jobs in various classes..." but not both.

condition tended to elicit stereotypical negative reactions from its own customers and/or constituents.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner Vernon Johnson prays that this Honorable Court grant Petitioner's Petition for Writ of Certiorari and review the decision of the Fifth Circuit Court of Appeals rendered on September 18, 1997.

Respectfully submitted,

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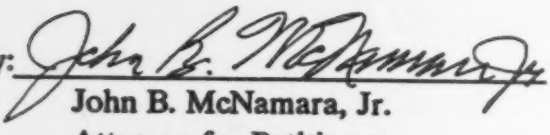
By: 
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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

VERNON G. JOHNSON,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No.
	§	W-96-CA-242
	§	
BAYLOR UNIVERSITY,	§	
Defendant.	§	

ORDER

Plaintiff Vernon G. Johnson ("Plaintiff" or "Johnson") brings this action as a result of his termination from employment at Defendant Baylor University ("Defendant" or "Baylor"). Plaintiff asserts that he was impermissibly terminated in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12110, et seq., and in violation of the Rehabilitation Act, 29 U.S.C. § 700, et seq. Defendant has moved to dismiss Plaintiff's claims and for summary judgment, while Plaintiff has moved to amend his complaint. Having reviewed the parties' briefs and the summary judgment proof presented, the Court has determined that Plaintiff should be allowed to amend his complaint, but that Defendant's motion for summary judgment should be granted.

Initially, the Court notes that in response to Defendant's Motion for Summary Judgment, Plaintiff requested leave to file an amended complaint to clarify the federal statutory basis for his claims. Defendant does not oppose this motion. Accordingly, it is ORDERED that Plaintiff's Motion to Amend

Complaint is **GRANTED**. As noted, Defendant has filed both a motion to dismiss and a motion for summary judgment. As thegrounds for both are identical, it is **ORDERED** that Defendant's Motion to Dismiss is **DENIED** as moot.

The basic underlying facts are not in dispute. Plaintiff, a heavy-set man, was hired by then-president Dr. Herbert H. Reynolds ("Reynolds"), to serve as a pilot for Baylor University. Approximately 2 ½ years afterwards; he was terminated ostensibly because of his personal appearance and other personal attributes that Reynolds believed reflected poorly on Baylor's image. In this suit, Plaintiff asserts that he was terminated in violation of federal law not because his weight made him disabled, but because Baylor University perceived him as disabled because of his weight at the time of his termination. The summary judgment proof presented reflects that Plaintiff has failed to establish a necessary element of his claim: that Baylor perceived him as being unable to perform either a class of jobs or a broad range of jobs in various classes.

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). A disputed material fact is genuine if the evidence is such that a jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). The initial burden to demonstrate the absence of a genuine issue concerning any material fact is on the moving party. Celotex v. Catrett, 477 U.S. 317, 325 (1986). This burden can be satisfied by pointing out to the district court that there is an absence of evidence to support an essential element of the non-moving party's case. Id. Upon such a showing, the burden shifts to the non-moving party to establish that there is a genuine issue. Id. at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary

judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. At 322.

The ADA prohibits discrimination on the basis of an employee's, or potential employee's, disability.[1] 42 U.S.C. § 12112. Therefore, in other [sic] to recover under the ADA, the plaintiff must establish that he possesses a disability. Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996). The term "disability" under the ADA means:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded a having such an impairment.

42 U.S.C. § 12102(2). As previously noted, Plaintiff does not assert that he was terminated because he was impaired, but because Baylor regarded him as having an impairment. An employee is regarded as having a substantially limiting impairment if he

---

[1] ADA and Rehabilitation Act cases are construed similarly. See Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir.1993), cert.denied, ___U.S.___, 114 S.Ct. 1386 (1994). Discussion of Plaintiff's ADA claim, therefore, applies equally to his Rehabilitation Act claim.

> (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting only because of the attitudes of other[s] toward such an impairment; and (3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment.

Bridges v. City of Bossier, 92 F.3d 329, 332 (5th Cir. 1996). See also Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727-28 n. 19 (5th Cir. 1995); 29 C.F.R. § 1630.2(l)(1)-(3).

Although the ADA does not define "substantially limits" or "major life activities," significant guidance is provided by regulations promulgated by the EEOC. Bridges, 92 F.3d at 332. "Major life activities" are defined by the EEOC regulations as functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking breathing, learning, and working." 29 C.F.R. § 1630.2(l). The only major life activity in which Plaintiff asserts that Baylor regarded him as substantially limited is working. The regulations further provide that

> [t]he term substantially limits means significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(l).

Even assuming all disputed facts in Plaintiff's favor, there is nothing to reflect that Baylor ever considered that Plaintiff's weight significantly restricted him in his ability to perform either

a class of jobs or a broad range of jobs in various classes. Although Plaintiff's personal appearance precluded his employment as a representative of Baylor who was routinely in contact with contributors and other important individuals, there is nothing to reflect that Baylor or Reynolds considered that Plaintiff would be unable to perform a pilot's job at another institution or organization. Nor is there anything to indicate that Baylor or Reynolds considered that Plaintiff's weight kept him from performing other types of jobs. Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** and Judgment shall be entered in Defendant's favor. It is further

ORDERED that any motions not previously ruled upon by the Court are **DENIED.**

SIGNED this 12th day of February, 1997.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-50194
Summary Calender

VERNON G. JOHNSON,

Plaintiff-Appellant,

VERSUS

BAYLOR UNIVERSITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W-96-CV-242)

Before JOLLY, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

---

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

The Fifth Circuit Court's opinion in this case idirectly conflicts with a similar case decided by the First Circuit Court, *Cook v. State of Rhode Island Department of Mental Health, Retardation, and Hospital*, 10 F. 3d 17 (1st Cir. 1993).

The Fifth Circuit Court's opinion in this case also conflicts with the language of this Court in *School Board of Nassau County, Fla. V. Arline*, 480 U.S. 273 (1987), that recognized that the Rehabilitation Act[1] was designed to protect those persons who were not physically handicapped as well as those persons who were. *Id.* at 279, n. 4. Even the dissenters in *Arline*, agreed that, in enacting and in amending the Rehabilitation Act, Congress intended to include within the protection of the Act persons who were disabled "solely by reason of the reaction of others." *Id.* at 292.

The First Circuit Court's opinion in *Cook v. State of R.I. Dept. Of MHRH*, cited supra, is wholly consistent with the language of this Court's opinion in *Arline*. The *Cook* court also recognized the impact of "perceptions" on employability, concluding that:

> "In a society that all too often confuses 'slim' with 'beautiful' or 'good', morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences." (at p. 28)

---

[1] ADA and Rehabilitation Act cases are construed similarly. *See, e.g., Chandler V. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert.denied*, 114 S.Ct. 1386 (1994). Therefore, case authorities cited with reference to the Rehabilitation Act are equally applicable to cases involving the ADA and vice versa.

Despite the fact that the Fifth Circuit's opinion in this case has limited impact as precedent for other cases because it is not published, the Plaintiff in this case was deprived of his day in court by the unreasonable burdens placed on Plaintiffs in disability cases brought in District Courts within the Fifth Circuit. This plaintiff would not have been similarly treated in the First Circuit and should not be subjected to further disparate treatment because of the circuit within which he resides.

Statement of Material Facts[2]

Johnson was hired by Baylor as the Chief Pilot on or about December 20, 1991, after an in-person interview with the President of Baylor, Dr. Herbert Reynolds. (R. 275-282, 288-295, 174-179) At the time that Johnson was interviewed, his body weight was approximately 275 pounds. Johnson immediately notified his employer that he would be terminating his employment to assume a new position at Baylor and he began work at Baylor on January 3, 1992.

On or about January 23, 1992, Johnson received a letter, dated December 23, 1991, from Reynolds stating that Reynolds was imposing a special condition on Johnson's employment that would required Johnson to reduce his body weight to 172 pounds by March 31, 1992, i.e. Johnson's continued employment at Baylor was conditioned on his losing over 100 pounds in less than 90 days. (R. 324, 300-320, 318-320, 213-215)

Dr. Reynolds, Johnson's immediate supervisor throughout his employment at Baylor, repeatedly criticized Johnson's weight, in addition to his "appearance", and expressly reiterated the requirement that Johnson lose weight, as

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[2] See also the summary of facts in the Opinion of the Fifth Circuit, Paragraph I. Appendix, p. 7.

required by the ADA to show a disability. Because a plaintiff must show a disability in order to proceed under the ADA, Baylor accordingly moved for summary judgment.

The district court agreed with Baylor, finding that Johnson had failed to offer sufficient evidence that Reynolds regarded Johnson's weight as substantially interfering with the only major life activity at issue--"working." Because Johnson could not make a showing that he was disabled under the ADA, the court granted summary judgment.

III.

We review a summary judgment de novo. *See Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. *See Hanks*, 953 F.2d at 997.

We begin our determination by consulting the applicable substantive law to determine what facts and issues are material. *See King v. Chide*, 974 F.2d 653, 655-656 (5th Cir. 1992). We then review the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-movant. *See id.* If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. *See Celotex*, 477 U.S. at 327; *Brothers v. Klevenhagen*, 28 F.3d 452, 455 (5th Cir. 1994).

IV.

In order to understand Johnson's evidentiary burden better, we first review the ADA's mandate: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).[3] Therefore, a plaintiff is obliged to make an initial showing that he has a "disability" in order to invoke the ADA's protections.[4]

---

[3] No one denies that Baylor is a "covered entity" under the ADA or the Rehabilitation Act.

[4] A plaintiff can prove discrimination under the ADA either directly or indirectly. Directly, he must show that he is disabled under the act; that with or without reasonable accommodation he could perform the job; and that the employer discharged him because of his disability. *See* 42 U.S.C. § 12112(a); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 162 (5th Cir.), *cert. denied*, 117 S.Ct. 586 (1996).

Alternately, he can use a burden-shifting analysis to make out a *prima facie* case of discrimination. *See, e.g., McDonnell Douglas Corp. V. Green*, 411 U.S. 792, 802 (1973). To do so, he must show that he is disabled under the act; that he is qualified with or without accommodation; that he was subject to an adverse employment action; and finally, that he was replaced with a non-disabled person. *See id; Burch v. Coca-Cola Co.*, No. 95-10990, 1997 WL 425943, at *13 (5th Cir. July 30, 1997); *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995). Both methods, however, require that the plaintiff make an initial showing that he is "disabled," as statutorily defined.

The ADA defines a "disability" as follows:

> The term "disability" means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12012(2). Johnson alleges that he is disabled under § 12102(2) (C): that Baylor regarded him as having a physical impairment--obesity--that substantially limits his major life activity of "working," as defined by EEOC regulation. *See* 29 C.F.R. § 1630.2(i) ("*Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.").

The EEOC regulations strictly construe "substantially limits the major life activity of working." Specifically, the regulations provide:

> (3) With respect to the major life activity of working–
>
> (i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single,

particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition . . ., the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skill or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j) (3).

Although what "substantially limits [the] major life activity [of working]" ultimately means is determined on a case-by-case basis, *see Byrne v. Board of Educ.*, 979 F.2d 560, 565 (7th Cir. 1992); *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986), the statutory language plainly does not prevent all adverse employment actions against a physically- or mentally-impaired employee. Thus, such an employee does not obtain tenure at his position because of his impairment. *See Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192 (5th Cir. 1996); 29 C.F.R. § 1630.2(j) (3) (i). Instead, the "substantially limits" statutory language, as it relates to "working," strikes a balance: It allows a disabled person a foot in the door of the labor market, *see Burch*, 1997 WL 425943, at *6, while at the same time, it tries not to impose an undue burden on an employer's freedom to make employment decisions he feels are in the best interests of his business, *see Tudyman v. United Airlines*, 608 F. Supp. 739, 747 (C.D. Cal. 1984) ("[P}rivate employers are generally free to be arbitrary and even capricious in determining whom to hire . . . .).

Johnson contends that Baylor perceived that his obesity substantially limited his major life activity of working. Therefore, once Baylor moved for summary judgment asserting that Johnson lacked the evidence necessary to go forward with a trial, Johnson, in order to defeat summary judgment, was obliged to offer enough evidence to show that there was a genuine fact issue that Baylor regarded Johnson's obesity as substantially limiting his major life activity of working. *Cf. Hanks*, 953 F.2d at 997. More specifically, Johnson would have to offer some evidence that Baylor believed (1) that Johnson could not obtain a position in the geographical area because of his obesity; (2) that Johnson could not obtain a job in the class of jobs utilizing similar skills and training--here, as a pilot--because of his obesity; or (3) that Johnson was unable to obtain a job, in the same geographical area, that did not utilize the same skills or training, but for which Johnson's obesity also disqualified him. *Cf.* 29 C.F.R. § 1630(j) (3) (ii) (A)-(C).

Johnson contends that requiring evidence of the factors mentioned above, which are taken verbatim from the EEOC's regulations, *see* 29 C.F.R. § 1630.2(j) (3) (ii), requires him to prove that no other employer in the relevant geographical or skill class areas would hire him. Not so. The "regarded as," or "perception," prong of the "disability" definition requires that a plaintiff provide evidence that the *employer thought* that other employers would not hire him because of his obesity. *See* 42 U.S.C. § 12012(2) (C).

Johnson casually addresses this evidentiary requirement only with vague accusations. In no instance does any part of the record, including the pleadings, the briefs, the depositions, the exhibits, and the other record contents, provide more than general assertions about Baylor's perceptions of Johnson's general employability. Yet, such evidence lies at the heart of Johnson's required showing that he is "disabled," *see* 42 U.S.C. § 12102(2) (C), and is thus necessary to prevent summary judgment.

A review of the evidence, through the three factors outlined in 29 C.F.R. § 1630.2(j) (3) (ii), reveals insufficient evidence to prevent summary judgment. First, Johnson's deposition and Reynolds's affidavit show conclusively that Reynolds regarded Johnson as a skilled pilot. Both parties acknowledge that Reynolds did not believe Johnson was unable to work in the class of pilot jobs because of his weight.

Second, Johnson offers no evidence that Baylor thought his weight made him unemployable in the Waco area labor market or elsewhere, and thus Reynolds's affidavit to the contrary stands unopposed. Finally, Johnson offers no evidence to contradict Baylor's affidavit that Baylor believed Johnson could obtain work in another class of jobs, such as airplane maintenance.

V.

We comment now on two of Johnson's other contentions. First, Reynolds's belief that Johnson could not get "a job at Baylor" or "a job in public relations" there or elsewhere is not sufficient to meet the "substantially limiting . . . working" requirement outlined above. *See, e.g., Bridges v. City of Bossier*, 92 F.3d 329, 332-34 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997). Such a construction of "working" would read "substantially" right out of the "substantially limits" language of§ 12102(2); it would force an employer to guarantee an employee a specific position. Such a result would run contrary to the ADA's intentions.[5]

Second, an employer's concern with a plaintiff's insurability could, as Johnson notes, provide indirect evidence of the employer's belief of the employee's general unemployability.[6] Thus, such evidence could help to meet the "regarded as" prong that a plaintiff is disabled. *See* 42 U.S.C. § 12102(2) (C).

From the record in this case, however, Johnson has offered no evidence to raise a genuine issue of material fact that Reynolds's concern about insurance costs resulted in Johnson's termination. Although Reynolds was concerned that overweight

---

[5] *See Heilweil v. Mount Sinai Hosp.*, 32 F.2d 718, 723 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995); 12 C.F.R. § 1630.2(j) (3) (i) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.").

[6] *See* C.F.R. § 1630(1) app. ("[C]ommon attitudinal barriers...frequently result in employers excluding individuals with disabilities. These include concerns regarding...insurance...").

people get sick more often, and thus increase the costs of health insurance, Johnson offers no evidence to overcome Baylor's sworn assertions that appearance standards, not insurance costs, led to his termination.

Nor does Johnson offer any evidence that his health insurance costs led Baylor to perceive him as generally unemployable. Indeed, Johnson's own discovery revealed that Baylor, although worried about health insurance costs of portly people, knowingly embraced the university's employment (andpresumably also its health insurance coverage) of at least two other overweight individuals.

VI.

The fact of the matter is that this single, particular job carried with it certain appearance standards. *Cf. Tudyman*, 608 F. Supp. at 745 (upholding an airline's weight limit for flight attendants). When Johnson failed to meet these standards, he was terminated. There is no error, and the judgment, accordingly, is AFFIRMED.

Date Entered: September 18, 1997

Supreme Court, U.S.
FILED
JAN 22 1998
CLERK

(2)

No. 97-1043

In The

Supreme Court of the United States

October Term, 1997

VERNON G. JOHNSON,

Petitioner,

v.

BAYLOR UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

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TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Course of Proceedings and Disposition in the Court Below 1

Statement of Facts 2

REASONS FOR DENYING THE WRIT 2

First Ground – This Case Is Not a Significant Decision 3

Second Ground – No Split in the Circuits 5

Third Ground – This Case Was Correctly Decided .. 11

Fourth Ground – The Case Contains Other Defects 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Andrews v. State of Ohio, 104 F.3d 803 (6th Cir. 1997) 24

Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104, 130 L. Ed. 2d 1071 (1995) 18

Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770, 136 L. Ed. 2d 715 (1997) 4, 21

Byrne v. Board of Education, School of West Allis, 979 F.2d 560 (7th Cir. 1992) 13

Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386, 128 L. Ed. 2d 61 (1994) 4, 17, 18, 20

Cook v. State of Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17 (1st Cir. 1993) 6, 7, 8

Daley v. Koch, 892 F.2d 212 (2d Cir. 1989) 19, 20

Dutcher v. Ingalls Shipbuilding, Inc., 53 F.3d 723 (5th Cir. 1995) 4, 17, 18

Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996) 4, 18

Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) 19

Francis v. City of Meriden, 129 F.3d 281 (2nd Cir. 1997) 23

Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907 (11th Cir. 1996) 9

TABLE OF AUTHORITIES – Continued

Page

Heilweil v. Mount Sinai Hospital, 32 F.3d 718 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1095, 130 L. Ed. 2d 1063 (1995) 18

Kelly v. Drexel University, 94 F.3d 102 (3rd Cir. 1996) 9

Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996) 4, 19, 21

Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997) 9, 22

Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995) 13

RULES AND STATUTES

29 C.F.R. § 1630, App., § 1630.2(g) 18

29 C.F.R. § 1630.2 14

29 C.F.R. § 1630.2(h) 23

29 C.F.R. § 1630.2(j)(3)(i) 19

29 U.S.C. § 700 ..... 1, 12

29 U.S.C. § 794 12

42 U.S.C. § 12102(2) 13

42 U.S.C. § 12110 ..... 1, 12

42 U.S.C. § 12112 ..... 12, 13

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Baylor University ("Baylor"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Vernon G. Johnson, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on September 18, 1997.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below.

Petitioner filed suit on June 20, 1996, alleging that Baylor discriminated against him on the basis of a perceived disability when Baylor decided to terminate Petitioner's employment as a pilot. Petitioner claimed discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12110 *et seq.*, and under the Rehabilitation Act, 29 U.S.C. §§ 700 *et seq.* At the close of discovery, on November 12, 1996, Baylor filed a Motion for Summary Judgment requesting that the Court grant summary judgment on both causes of action brought by Petitioner against Baylor. After the Motion was fully briefed by the parties, on February 12, 1997, the Court granted Baylor's Motion for Summary Judgment and entered a final judgment dismissing the case. (Petitioner's Appendix, hereinafter "Appendix" p. 1). Petitioner appealed to the U.S. Court of Appeals for the Fifth Circuit, and the U.S. Court of Appeals for the Fifth Circuit

affirmed the District Court's Judgment in an unpublished opinion entered on September 18, 1997. (Appendix p. 6).

Statement of Facts

Plaintiff commenced work as the Chief Pilot for Baylor on or about January 3, 1992. Plaintiff's employment with Baylor was terminated on August 26, 1994, after the then-President of Baylor, Dr. Herbert H. Reynolds, noted that "Johnson is a qualified pilot but his personal attributes diminish his professionalism and thus diminish the image of Baylor University. He does not represent the University in the way it must be represented." Dr. Reynolds had previously been critical of Plaintiff for his poor personal appearance, his use of incorrect grammar, his poor dress and grooming, and his failure to lose weight.

In affirming the District Court, the Fifth Circuit Court of Appeals followed well-established precedent from both within and outside the Fifth Circuit which establishes that the plaintiff in a perceived disability case must offer proof that the employer perceived the employee as being unable to work at a broad range of jobs in various classes within an accessible geographic region.

REASONS FOR DENYING THE WRIT

Petitioner appears to assert two reasons why this Court should grant a writ of certiorari in this case. First, Petitioner claims this is a significant case of public interest. Second, Petitioner claims there is a split in the Circuit

Courts of Appeals on the standard of proof for determining whether an employer has discriminated against an employee on the basis of a perceived disability. In fact, this case is not a significant case. Further, this case does not conflict with the other Court of Appeals' case cited by Petitioner. Neither this case separately nor when reviewed with the other Courts of Appeals' cases justifies the granting of the writ of certiorari requested by Petitioner. Petitioner's reasons are discussed in turn below. Following a discussion of the responses to Petitioner's arguments, Baylor will demonstrate that the Fifth Circuit's decision is correct. Lastly, Baylor will show that there is an additional defect in Petitioner's claims which would render review of the case pointless.

First Ground – This Case Is Not a Significant Decision

The Petitioner contends that this is a case of "grave significance." It is a case, like all cases, which is important to the parties; however, the Petitioner's own conduct and the Fifth Circuit Court's handling of this case clearly show that it is not a case of such importance.

Baylor filed its Motion for Summary Judgment on the last day permitted under the District Court's Scheduling Order for the filing of dispositive motions. Thus, Petitioner had the full allotment of time permitted by the District Court for discovery. Petitioner conducted no discovery in the case prior to the filing of the Motion for Summary Judgment. After the Motion was filed, Petitioner took the deposition of one employee of Baylor, Dr. Herbert H. Reynolds. Petitioner took no other depositions and never sent written discovery to Baylor.

In his Response to the Motion for Summary Judgment, Petitioner chose to rely only on his own Affidavit and selections from the only two depositions taken in the case, his deposition and the deposition of Dr. Reynolds. Petitioner did not submit any affidavits of third parties or attempt to take any additional depositions to develop evidence which might help him oppose the Motion for Summary Judgment. Petitioner's lack of effort in prosecuting the case and his half-hearted effort in resisting the Motion for Summary Judgment indicates that this case was not very important to him. This is not particularly surprising in light of the fact that Petitioner had found other employment as a pilot before the Motion for Summary Judgment was filed and shortly after exhausting his unemployment benefits. It should also be noted that Petitioner did not file a motion for rehearing or a motion for rehearing en banc with the Fifth Circuit.

This case is not important to the jurisprudence of the Fifth Circuit. The Fifth Circuit simply followed the holdings of several previous Fifth Circuit decisions dating back a number of years. *See, e.g., Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770, 136 L. Ed. 2d 715 (1997); *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996); *Dutcher v. Ingalls Shipbuilding, Inc.*, 53 F.3d 723 (5th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386, 128 L. Ed. 2d 61 (1994). In fact, the law recited by the Fifth Circuit in its opinion is so much common knowledge among employment law practitioners that the Court did not order its opinion to be published.

This case is simply one of the thousands of non-meritorious employment lawsuits which are filed by disgruntled employees every year and which are needlessly clogging our court system. The District Court properly granted summary judgment in Baylor's favor. Petitioner appealed and premised his appeal on a misconstruction of the District Court's opinion.[1] The Fifth Circuit saw through that argument and properly affirmed the District Court on the correct grounds. Petitioner refuses to give up his vendetta against Baylor and now comes to this Court with the arguments that the case is of grave importance and that there is a conflict among the Circuit Courts. Baylor has just demonstrated the lack of importance of this case. Baylor will now demonstrate that the purported conflict is contrived.

Second Ground – No Split in the Circuits

Petitioner contends that this Court should grant a writ of certiorari to review this case because of a claimed

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[1] In the Court of Appeals, Petitioner argued that the District Court had required him to prove that other employers would discriminate against him because of his obesity. This was not the holding of the District Court, and Petitioner mischaracterized the District Court's holding in an effort to create an issue for appeal. Petitioner continues this pattern of misframing the issue in his Petition for Writ of Certiorari. Petitioner tries to phrase the issue in terms of a physical *condition*. As will be discussed in more detail below, having a condition is not the test. An employee must have an *impairment* which amounts to a *substantial limitation* in a major life activity. Petitioner is attempting to misphrase the issue in order to lower the standard for asserting a claim and to confuse the issue before the Court.

split in the decisions of the Circuit Courts of Appeals. Petitioner makes this contention because the summary judgment for the employer in this case was affirmed while the First Circuit affirmed a judgment for an obese plaintiff bringing a perceived disability claim under the Rehabilitation Act. *See Cook v. State of Rhode Island, Department of Mental Health, Retardation, and Hospitals,* 10 F.3d 17 (1st Cir. 1993). There is no conflict between the Fifth Circuit's opinion in this case and the First Circuit's opinion in *Cook*. Petitioner states that the Fifth Circuit has unfairly required an employee to produce some evidence that the employer perceived the employee to be unable to perform a broad range of jobs for employers in the geographic area to which the employee has reasonable access by, for example, providing evidence that the employer thought that other employers would not hire the employee. Petitioner then goes on to assert that the Fifth Circuit's holding differs from the First Circuit's opinion in *Cook* by implying that the First Circuit would not require such evidence. Petitioner's assertion is unfounded. The *Cook* opinion is entirely consistent with the Fifth Circuit's opinion, and the *Cook* opinion actually supports Baylor's position. In *Cook*, the plaintiff established that the employer believed that the employee was precluded from working at a broad range of jobs for many employers:

> By his own admission, Dr. O'Brien believed plaintiff's limitations foreclosed a broad range of employment options in the health care industry, including positions such as community living aide, nursing home aide, hospital aide, and home health care aide. Detached jurors reasonably could have found that this pessimistic

> assessment of plaintiff's abilities demonstrated that appellant regarded Cook's condition as substantially limiting a major life activity – being able to work.

10 F.3d at 25. Thus, the *Cook* plaintiff met the test articulated by the Fifth Circuit in this case; she showed that her employer believed that other employers would not hire the plaintiff. Petitioner in the present case provided no proof of anything remotely equivalent to the evidence presented by the plaintiff in *Cook*. The *Cook* Court further noted that there was evidence to support liability because the plaintiff produced evidence that the employer perceived that she had physical limitations that would keep her from qualifying for a broad range of jobs. *Id.* at 26. Again, Petitioner produced no such evidence. Under the tests articulated by the First Circuit in *Cook*, Petitioner would have fared no better in the First Circuit than he did in the Fifth Circuit.

Petitioner is attempting to use the *Cook* case to confuse the issues in this case. Petitioner tries to use *Cook* to show that he has an impairment. The issue in this case and in the appeal and Motion for Summary Judgment below is not whether Petitioner's obesity amounted to an impairment but instead whether an alleged perceived impairment, if any, led to a perception that he had a substantial limitation in a major life activity such as preclusion from working at a broad range of jobs in various classes. Petitioner simply refuses to accept the fact that being "a representative of Baylor" is not a "broad range of jobs in various classes within an accessible geographic region."

The *Cook* case is quite consistent with Fifth Circuit case law on perceived disability claims. The *Cook* Court required the plaintiff to prove that the defendant believed that she was precluded from working in a broad range of jobs. "We think there is a significant legal distinction between rejection based on a job-specific perception that the applicant is unable to excel at a narrow trade and a rejection based on more generalized perception that the applicant is impaired in such a way as would bar her from a large class of jobs." *Id.* at 26. Thus, the First Circuit has, as has the Fifth Circuit, properly focused on the perception of the employer with respect to the employee's employment prospects.

The only real distinction between the *Cook* case and the present case is that different decisions were reached when different facts were applied to the same legal standard. This is not surprising – the plaintiff in *Cook* provided ample evidence that her employer perceived that she could not work in a broad range of jobs for other employers. Petitioner provided no such evidence, and, not surprisingly, the outcome was different.

In addition to being consistent with *Cook*, the Fifth Circuit's opinion in this case is also in conformity with the decisions of other Circuit Courts which have considered the issue. Like the Fifth Circuit, the other Circuit Courts have focused on what proof the plaintiff offered as to what the employer thought about the plaintiff's employability in other jobs and with other employers. For example, the Tenth Circuit has held that "an employer regards an employee as substantially limited in the ability to work when the employer regards the employee's

impairment or perceived impairment as foreclosing generally the type of employment involved." *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 904 (10th Cir. 1997). "It is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters." *Id.* at 905. The Third Circuit has relied on the supervisor's testimony that he did not regard the employee as being disabled in upholding a summary judgment for the employer in a perceived disability case. *Kelly v. Drexel University*, 94 F.3d 102, 109 (3rd Cir. 1996). Likewise, the Eleventh Circuit has focused on the perception of the employer in holding that "a significant impairment is one that is viewed by the employer as generally foreclosing the type of employment involved, not just a narrow range of job tasks." *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 913 (11th Cir. 1996). As the foregoing review of case law from a sampling of other circuits shows, there is no split in authority among the circuits as to the employee's burden to show that the employer perceived that the employee could not work at a broad range of jobs.

While it is clear that there is no split among the circuits with respect to the legal standard applicable to perceived disability cases and that this case does not merit the Supreme Court's attention, it is worth pondering for a few moments what Petitioner is asking this Court to do. Petitioner is asking this Court to convert appearance standards adopted by employers into legally recognized perceived disabilities. Under Petitioner's circular reasoning, any appearance standard which an employee cannot meet therefore prevents the employee from working at that job or similar jobs with the

employer, and the employee thus has a perceived disability for which he can now sue. A few examples will suffice to show how Petitioner's theory would turn the ADA on its head and open the floodgates for all kinds of petty lawsuits. Example one: an Italian fashion design house desires to hire slender models to model its clothing at an American fashion show. Under Petitioner's theory, the design house could not take weight or appearance into consideration in hiring the models, regardless of whether they could even fit into the clothes. Example two: a police department imposes weight standards because leaner police officers are more likely to be in better physical condition and more able to pursue fleeing suspects. Under Petitioner's theory, the police department could not take such considerations into account, regardless of whether they possibly affected public safety. Example three: a designer of clothing for overweight individuals desires to hire appropriately built individuals to model the clothing. Under Petitioner's theory, the designer will have to hire thin models if they apply and even if their employment harms the employer's business.

Petitioner would undoubtedly assert that the above examples are extreme and that, further, he is only trying to protect the "morbidly obese." Nevertheless, once the Court started down the road proposed by Petitioner, such lawsuits would become commonplace because there would be no reason to distinguish between an appearance standard based on weight and other appearance standards. Further, if only the morbidly obese are protected, then even more ridiculous results would occur. Under such a rationale, the fashion design house can reject the model who is ten pounds overweight but must

hire the one who is 100 pounds overweight, and the fire department can reject the firefighter who is twenty pounds overweight but would have to hire one who is even more than 100 pounds overweight.

In the few short years that the ADA has been in existence, attorneys for employees have already proposed legal theories which far exceed the intended scope of the ADA. The theory postulated by Petitioner far exceeds the intent of the ADA and, if adopted, would make it impossible for employers to impose appearance standards on employees.

As demonstrated above, there is no split among the Circuit Courts with respect to the applicable legal standard. Petitioner has attempted to manufacture a split in order to present this Court with a legal theory which would greatly expand litigation under the ADA. This Court should not countenance Petitioner's attempt to misconstrue the ADA.

Third Ground – This Case Was Correctly Decided

In his First Amended Original Complaint, which was his live pleading at the time summary judgment was granted, Petitioner asserted two causes of action for discrimination due to an alleged perceived disability. Specifically, in Paragraphs 18-21 of his First Amended Original Complaint, Petitioner alleged as follows:

> 18. Baylor, acting by and through its agent, then-President Herbert H. Reynolds, perceived Johnson's obesity to be a disability substantially limiting Johnson's ability to perform a broad

range of jobs that involved identification with and/or representation of Baylor.

19. At all times during his employment, Johnson was qualified for employment as Chief Pilot of Baylor, having the requisite skill, experience, education, and other job-related requirements of the employment position and Johnson was able to perform the "essential functions" of the position without reasonable accommodation.

20. Johnson's employment with Baylor was terminated as a direct and proximate result of Johnson's obesity; and Baylor's action in terminating Johnson's employment constituted intentional discrimination against him on the basis of his physical condition, i.e. obesity, which was perceived to be a disability that precluded Johnson from being employed as a representative of Baylor.

21. Baylor's actions in terminating the employment of Johnson violates 42 U.S.C. § 12112, *et seq.*, and 29 U.S.C. § 794, which prohibit discrimination on the basis of disability.

Petitioner's perceived disability claims were brought under the Americans with Disabilities Act, 42 U.S.C. §§ 12110, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 700, *et seq*. The standard for a perceived disability claim under the two statutes is identical.

As will be discussed in greater detail below, in order to maintain a perceived disability claim, a plaintiff must prove that the employer perceived him as being unable to work at a broad range of jobs in various classes within an

accessible geographic region. Before turning to the relevant authority on perceived disability claims, it may be helpful to review the underlying statutory basis for such a claim. The ADA prevents employers from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). The ADA defines "disability" as follows:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
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> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Petitioner attempted to plead his case so as to fall under subsection (C). "Read in conjunction with subsection (A), subsection (C) prescribes that a person is considered disabled for purposes of the ADA if that person is regarded as having an impairment that 'substantially limits' a 'major life activit[y].' " *Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995). The limiting adjectives "substantially" and "major" indicate that the perceived "impairment must be a significant one." *Byrne v. Board of Education, School of West Allis*, 979 F.2d 560, 564 (7th Cir. 1992). "A person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment." *Wooten*, 58 F.3d at 385.

The Equal Employment Opportunity Commission regulations provide in relevant parts:

29 C.F.R. § 1630.2:

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits:

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under

which the average person in the general population can perform that same activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment;

(iii) The permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working:

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining

whether an individual is substantially limited in the major life activity of "working":

> (A) The geographical area to which the individual has access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skill or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Petitioner attempted to plead that Baylor perceived him to be unable to perform the major life activity of "working" at Baylor. Petitioner did not, and could not, plead or prove the necessary allegation that Baylor perceived him as being unable to work at a broad range of jobs in various classes within an accessible geographic

region. In fact, Petitioner's Original Complaint and First Amended Original Complaint conclusively established that Baylor perceived that he could work at other jobs for other employers, including other pilot jobs. As noted in the Original Complaint and First Amended Original Complaint, Dr. Reynolds commended Petitioner on his piloting skills and found that he met the standards concerning the knowledge of his job and the quantity of his work. Petitioner also held a medical certificate which permitted him to work as a commercial pilot. In any event, the Affidavit of Dr. Reynolds submitted with Baylor's Motion for Summary Judgment established that Dr. Reynolds did not perceive that Petitioner could not work for other employers in either this class of jobs or a broad range of jobs in various classes. Accordingly, summary judgment for Baylor was appropriate.

The Fifth Circuit and other Circuits have analyzed the statutes and regulations and have held that a plaintiff in a perceived disability case must prove that the employer perceived that the disability prevented the plaintiff from holding a broad class of jobs. In *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995), the Fifth Circuit upheld a summary judgment for the employer in a perceived disability case because the plaintiff did not present evidence that her disability prevented her from "performing an entire class of jobs." *Id.* at 727. The inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to a substantial limitation of the activity of working. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993),

cert. denied, 128 L. Ed. 2d 61 (1994).[2] " 'Working' does not mean working at a particular job of that person's choice." *Wooten*, 58 F.3d at 386. "An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1095, 130 L. Ed. 2d 1063 (1995).

The Fifth Circuit also considered a perceived disability claim in *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996).

> As noted, an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job; "[t]he statutory reference to a substantial limitation indicates instead that an employer regards an employee as [substantially limited] in his or her ability to work by finding the employee's impairment to foreclose generally the type of

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[2] Although *Chandler* is a Rehabilitation Act case, the definition of "disability" in the ADA is virtually the same as in the Rehabilitation Act, making cases decided under the Rehabilitation Act instructive. "[T]he substantial equivalency of the definition of disability under the Rehabilitation Act and the ADA strongly suggest that prior constructions of the Rehabilitation Act should be generally applicable in construing the ADA definitions of 'disability.' " *Dutcher*, 53 F.3d at 727 n. 14. "The legislative history of the ADA indicates that 'Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term "disability" as used in the ADA.' " *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104, 130 L. Ed. 2d 1071 (1995) (quoting 29 C.F.R. § 1630, App., § 1630.2(g)).

> employment involved." *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986); *see also* 29 C.F.R. § 1630.2(j)(3)(i).

Id. at 192; *see also Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996) (inability to perform one aspect of a job does not constitute a substantial limitation in the major life activity of working). Petitioner did not plead that Baylor perceived that he could not generally work as a pilot for some other employer. It is clear from the Complaint and from Dr. Reynold's Affidavit that Baylor did not perceive that Petitioner could not be a pilot. The performance reviews clearly praised Petitioner for his ability to be a pilot. Instead, Petitioner's complaint, like that in *Dutcher*, was that Baylor perceived Petitioner as being unable to perform only one aspect of the pilot's job at Baylor – that of being a representative of Baylor. The inability to perform this aspect of the pilot's job is not sufficient to support an allegation of perceived disability because Baylor clearly perceived Petitioner as able to be a pilot. As a result, there was no perceived restriction on Plaintiff's ability to be a pilot.

The Second Circuit's decision in *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989), shows how far Petitioner's claim fell short of the mark. In *Daley*, the New York City Police Department refused to hire the plaintiff because he scored poorly on a psychological evaluation. The plaintiff alleged that the Police Department perceived his personality traits to be a disability and that this disability substantially limited him in a major life activity – working in the Police Department. The District Court granted summary judgment, which was affirmed. The Court of Appeals held:

> However, the regulations cannot be interpreted to extend this definition to include working at the specific job of one's choice. The position of New York City police officer demands unique qualifications that appellant has failed to meet. Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity.

892 F.2d at 212 (internal citations omitted). The City of New York employs over 27,000 police officers. *Chandler*, 2 F.3d at 1392 n. 29. If it is lawful for New York City to exclude a potential employee from 27,000 positions due to the failure to meet a standard, then it is certainly lawful for Baylor to exclude Petitioner from a much smaller number of positions due to his failure to meet Baylor's standards.

Rather than address the cases which mandate that summary judgment be granted for Baylor, Petitioner has tried to cherry pick from the definitions contained in an appendix to the Code of Federal Regulations to try to find an example which he contends is similar to his situation. Petitioner now contends that his appearance was "somewhat like a cosmetic disfigurement." Petitioner tries to analogize his case to that of a salesperson with a prominent facial scar. In making this argument, Petitioner attempts to blur the distinction between an "impairment" and a "disability." A facial scar may be an "impairment," but it does not rise to the level of a "disability" unless the employer regards the impairment as substantially limiting the employee's ability to work in a broad range of jobs. In the facial scar example cited in the Appendix, it is assumed that the employer believes that the employee cannot work as a salesperson, which could be a broad

range of jobs. In the present case, the summary judgment proof established that Baylor only believed that Petitioner was excluded from a narrow range of jobs at Baylor. In fact, the evidence further showed that Baylor believed that Petitioner was fully capable of performing other pilot jobs. As Petitioner offered no summary judgment evidence that Baylor believed he could not perform a broad range of jobs, the District Court properly granted summary judgment for Baylor.

In *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996), the Court held that Ray's inability to perform continuous lifting did not amount to a disability. Likewise, in the present case, Petitioner has presented no evidence that Baylor perceived that he could not perform any of the major life activities of caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working. Without such proof, there is no evidence of a perceived disability.

In *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770, 136 L. Ed. 2d 715 (1997), the plaintiff's mild hemophilia caused the City to refuse to hire him as a firefighter which also precluded him from being hired as a municipal paramedic or EMT. The Court found that this limitation only affected a narrow range of jobs. *Id.* at 334. The Court further held that the plaintiff had not shown that he was prevented from working in a class of jobs, as being a firefighter was too narrow to be a class of jobs. *Id.* at 335-36. This holding shows that Petitioner's evidence did not even approach creating a genuine issue of material fact. If the position of being a firefighter, paramedic, or EMT does not amount to a broad range or class of jobs, then being a pilot (or even an

"executive") for Baylor certainly does not amount to a broad range or class of jobs.

An example from another circuit also demonstrates that Petitioner's evidence was insufficient to create a genuine issue of material fact. In *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997), two commuter airline pilots were denied positions with a major air carrier because, although their corrected vision was 20/20, their uncorrected vision exceeded United's standard for uncorrected vision of 20/100 or better. Plaintiffs alleged that United regarded them as being disqualified from an entire class of employment, that of being a global airline pilot. The District Court dismissed the case, and the Court of Appeals affirmed the dismissal. The Court held that "global airline pilot" was too narrow of a description to constitute a class of jobs. *Id.* at 905. The Court noted that: "Adopting Plaintiffs' reasoning would imply that anyone who failed to obtain a single job because of a single requirement of employment would become a 'disabled' individual because the employer would thus be regarding the applicant's failure as substantially limiting in the major life activity of working." *Id.* Such a construction of the ADA would serve as a handout to those who are in fact capable of working in substantially similar jobs. *Id.* at 906.

The above discussion of applicable case law indicates that Petitioner did not come close to meeting his summary judgment burden of providing evidence that Baylor perceived that he was substantially limited in performing either a class of jobs or a broad range of jobs in various classes. Accordingly, the Fifth Circuit properly affirmed the summary judgment for Baylor.

Fourth Ground – The Case Contains Other Defects

Lastly, Baylor would note that there is another ground on which summary judgment and affirmance would have been proper, thereby making it pointless for the Court to address the issues raised by Petitioner. Petitioner failed to plead or prove another essential aspect of his cause of action, i.e., whether the employer perceived that the obesity was related to a physiological disorder. Relying on the EEOC's regulations, two Courts of Appeals have recently addressed obesity cases and held that there must be proof that the employer perceived that the obesity was caused by a physiological disorder. The EEOC's interpretive regulations to the ADA explain that "the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, *weight* or muscle tone that are within 'normal' range *and are not the result of a physiological disorder.*" 29 C.F.R. § 1630.2(h) (emphasis added). While Petitioner may argue that his weight was outside normal range, he has no evidence to show that Baylor perceived that his weight was the result of a physiological disorder.

In *Francis v. City of Meriden*, 129 F.3d 281 (2nd Cir. 1997), an overweight firefighter sued under the ADA after he was disciplined for failing to meet the City's weight standards. The District Court dismissed the case and the Second Circuit affirmed because there was no allegation that the obesity related to a physiological disorder. The Court noted that, to hold otherwise, would open up the "regarded as" prongs of the ADA and the Rehabilitation Act to a range of physical conditions not meant to be covered by these acts. *Id.* at 286. "This would make the central purpose of the statutes, to protect the

disabled, incidental to the operation of the 'regarded as' prong, which would become a catch-all cause of action for discrimination based on appearance, size, and any number of things far removed from the reasons the statutes were passed." *Id.* at 287. The Sixth Circuit has also held that there must be proof that the employer believed that the employee's obesity was caused by a physiological disorder in order to make out a perceived disability claim. *Andrews v. State of Ohio*, 104 F.3d 803 (6th Cir. 1997).

As Petitioner has failed to allege or submit evidence that Baylor perceived that his obesity was due to a physiological disorder, it would be pointless for this Court to devote its resources to a case which is doomed to dismissal on an alternate ground.

CONCLUSION

Petitioner has failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. There is no split among the circuits. Rather, in this case and the other case cited by Petitioner, the Courts of Appeals applied the same rule of law to the different facts presented in each case. Each court then reached a proper decision based on those facts. Further, this case has not been used by the District Court or the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties.

Petitioner contends the Fifth Circuit Court of Appeals reached an incorrect result; however, this appears to be an argument that the Fifth Circuit Court of

Appeals improperly applied the law established by the statute and regulations to the facts in this case. Such an evidentiary review is not favored by this Court. Further, Respondent strongly believes that the District Court and the Fifth Circuit Court of Appeals were correct in their decisions. This case does not merit further review by this Court.

For all of the foregoing reasons, Respondent requests that Petitioner's petition be denied.

Respectfully submitted,

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